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Supreme Court, U.S.

**FILED**

**MAR 16 1987**

JOSEPH F. SPANIOL, JR.  
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA,

*Respondent,*

v.

MICHAEL THOMAS TIMMERMANN,

*Petitioner.*

## JOINT APPENDIX

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JOSHUA R. TREEM,  
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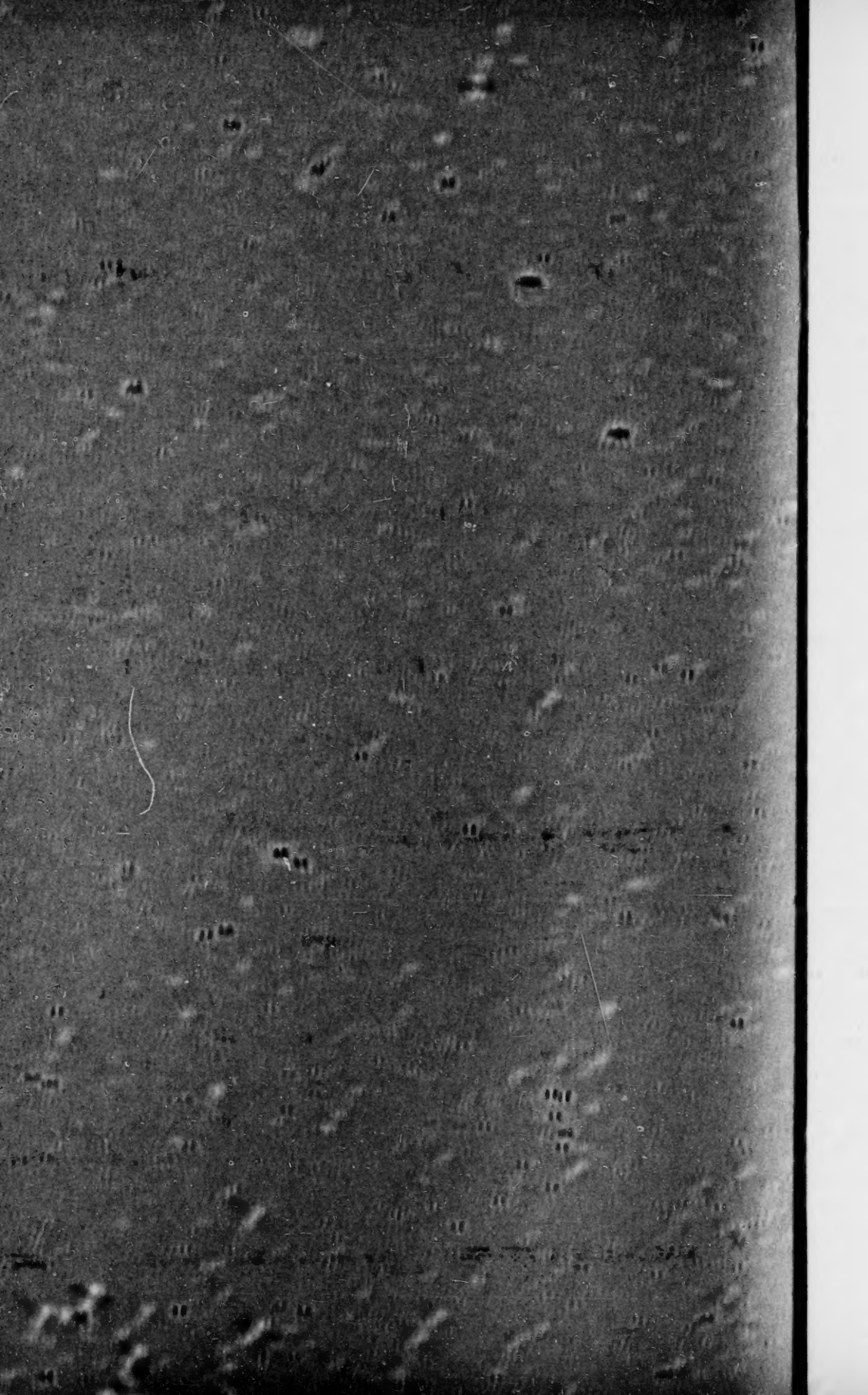


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OPINION OF THE COURT BELOW

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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No. 85-5521

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United States of America,

Appellee,

versus

Michael Thomas Timmermann,

Appellant.

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No. 85-5524

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United States of America,

Appellee,

versus

Russell Maurice Mattei,

Appellant.

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No. 85-5528

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United States of America,

Appellee,

versus

Gary Dale Moses,

Appellant.

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No. 85-5529

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United States of America,

Appellee,

versus

Bernard Albert Campbell,

Appellant.

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No. 85-5530

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United States of America,

Appellee,

versus

John Christopher Dorsch,

Appellant.

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No. 86-5511

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United States of America,

Appellee,

versus

Michael Thomas Timmermann,

Appellant.

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No. 86-5512

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United States of America,

Appellee,

versus

Russell Maurice Mattei,

Appellant.

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No. 86-5513

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United States of America,

Appellee,

versus

Gary Dale Moses,

Appellant.

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No. 86-5514

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United States of America,

Appellee,

versus

Bernard Albert Campbell,

Appellant.

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No. 86-5515

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United States of America,

Appellee,

versus

John Christopher Dorsch,

Appellant.

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Appeal from the United States District  
Court for the District of  
Maryland, at Baltimore.

Herbert F. Murray,  
United States District Judge.  
(CR HM-84-00325)

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Argued: October 9, 1987  
Decided: December 3, 1986

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Before HALL, CHAPMAN and WILKINS,  
Circuit Judges.

Joshua R. Treem; Robert T. Durkin, Jr.;  
Keith Krissoff; Gregory M. Wilson; James  
A. Bensfield (Kenneth Robinson; Thomas  
Dyson on brief) for Appellants; Glenda G.  
Gordon, Assistant U.S. Attorney (Breckin-  
ridge L. Willcox, U.S. Attorney on brief)  
for Appellee.

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PER CURIAM:

Defendants Harris, Timmermann, Mattei,  
Moses, Campbell, and Dorsch appeal the



trial judge's denial of their motion to dismiss the indictment after a mistrial was declared during their first trial. Subsequently, Harris' case was severed from the others and Defendants Timmermann, Mattei, Moses, Campbell, and Dorsch were retried and convicted by jury of conspiracy to possess cocaine with intent to distribute and possession with intent to distribute. They appeal advancing a number of grounds for the reversal of their convictions. We decline to review Defendant Moses' contention of denial of ineffective assistance of counsel and find no error as to the other issues raised.

I.

This initial statement of the facts is confined to a brief overview of the government's case and to the procedural history. Other pertinent facts will be stated in relation to specific contentions.

From March 1981 through December 1982, Alan Bozman distributed cocaine for a network headed by Defendant Harris. Defendants Timmermann, Mattei, Campbell, and Dorsch bought cocaine from Bozman. Moses was an employee of Bozman who became a runner for Harris. Purchasers made contact with Bozman through an answering service by leaving messages for "John Galt."

In July 1984, a federal grand jury returned an 18-count indictment against 15 individuals, including Bozman and Defendants Harris, Timmermann, Moses, Campbell, and Dorsch, on charges of conspiracy to possess cocaine with intent to distribute and possession of cocaine with intent to distribute. In August 1984, a superseding indictment was returned adding new substantive counts and substituting Defendant Russell Maurice Mattei for Russell Steven Mattie. This similarity in

names led to the arrest of Russell Steven Mattie who was not involved. This error was corrected and Defendant Russell Maurice Mattei was subsequently arrested.

A jury trial involving the appellants began on March 5, 1985. Bozman entered a guilty plea and became a government witness. The district judge granted a mistrial during the third week of the presentation of the government's case due to improper responses of a government witness. Defendants' motion to dismiss the indictment on grounds of double jeopardy was denied and retrial was set for late September 1985.

On September 26, 1985, Defendant Harris was severed from the case due to his hospitalization. Motions for continuance by the remaining Defendants were denied. Defendants Timmermann, Moses, Campbell, Mattei, and Dorsch proceeded to trial on September 30, 1985 and were convicted on

one count each of conspiracy and possession with intent to distribute. Moses was acquitted on two other counts of possession with intent to distribute.

II.

The trial judge declared a mistrial in the first trial because the DEA agent in charge of the case expressed an opinion as to the guilt of Defendant Mattei when questioned on direct examination about the circumstances of Russell Maurice Mattei's substitution for Russell Steven Mattie in the superseding indictment. Responding to the question, "What did you do that day?" the DEA agent testified: "He told me he was innocent, and from his demeanor, I believed him. I saw truth in his eyes, and I took steps to determine if, in fact, he was the guilty Mr. Mattie [sic] or the innocent Mr. Mattie."

Defendants moved for dismissal of the indictment arguing that the government

intentionally goaded them into seeking a mistrial and thus retrial was barred on grounds of double jeopardy under Oregon v. Kennedy, 456 U.S. 667 (1982). The district judge denied the motion to dismiss finding that although the government may have been negligent in not cautioning the witness, it did not intend to goad a motion for mistrial.

The double jeopardy clause generally does not bar retrial after a mistrial. When an accused obtains a mistrial, he can avoid a second trial only if "the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial...." Oregon v. Kennedy, 456 U.S. at 676. The question of the government's intent is one of fact and the trial court's finding on the issue is subject to the clearly erroneous standard. United States v. Wentz, \_\_\_ F.2d \_\_\_, No. 85-5243 (4th Cir. Sept. 19, 1986), citing Robinson

v. Wade, 686 F.2d 298, 309 (5th Cir. 1982).

The refusal to dismiss the indictment after granting a mistrial was not reversible error. The question asked by the government--"What did you do that day?"--clearly called for a factual response, rather than an opinion answer. The trial judge expressed the belief that one of the reasons that a cautionary instruction was not given to the witness was the "exemplary fashion in which counsel for both sides had conducted themselves throughout the trial." The factual finding of the trial judge who observed the conduct throughout three weeks of trial is amply supported in this case.

### III.

After the mistrial in March 1985, retrial was set for Monday, September 30, 1985. On Tuesday, September 25, 1985, counsel for appellants discovered that

Defendant Harris had checked himself into a hospital. On Thursday, September 26, the district judge heard Defendant Harris' motion for severance and motions for continuance from Defendants Dorsch, Mattei and Timmermann. Dorsch and Mattei sought a delay to allow them time to reassess their cases since Harris' attorney had been "lead" attorney by informal agreement of counsel. Timmermann sought a continuance until Harris would be available to testify on his behalf. The district judge granted the motion for severance and denied the motions for continuance.

We find no abuse of discretion. When a continuance is sought to secure the attendance of a witness, the party requesting the continuance must show who the witness is, what the testimony will be, that the testimony will be competent and relevant under the issues in the case, that the witness can probably be obtained



if the continuance is granted, and that due diligence has been used to obtain his attendance at trial. United States v. Clinger, 681 F.2d 221, 223 (4thCir.), cert. denied, 459 U.S. 912 (1982). Timmermann did not attempt to subpoena Harris. There is no showing that had he been subpoenaed he would not have been available. He may not now complain of Harris' absence.

Counsel had the benefit of participating in three weeks of the presentation of the government's case prior to the mistrial. They had four months to review Jencks Act materials and transcripts of the previous trial. Simply because "lead" counsel is removed from a case is no automatic basis for a continuance. The district judge did not abuse his discretion in denying this motion.

#### IV.

During the retrial in the middle of the



government's case, the trial judge removed Defendant Moses' counsel at Moses' request. Substitute counsel was immediately appointed and the trial continued without delay. Moses was subsequently convicted on two counts and acquitted on two other counts. He appeals his convictions alleging ineffective assistance of counsel.

We decline to address this issue on the record before us. Defendant Moses is free to raise the issue of the effectiveness of his trial counsel in an application for a writ of habeas corpus under 28 U.S.C.A. §2255 (West 1971).

V.

Defendants Campbell, Mattei and Dorsch challenge several evidentiary rulings by the trial judge. We find no abuse of discretion and reject their contentions.

Finally, Defendants Timmermann, Mattei and Dorsch assert that there was insuffi-

cient evidence to support their convictions. These arguments have no merit. The convictions are supported by the testimony of Bozman and other co-conspirators in addition to other evidence presented by the government.

VI.

In conclusion, the trial judge did not err in denying the motion for dismissal of the indictment on double jeopardy grounds. There was no abuse of his discretion in denying the motions for continuance or in ruling on the various evidentiary issues. The convictions are supported by the evidence. Finally, we decline to address the issue of ineffective assistance of counsel in this direct appeal. Accordingly, the convictions are affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

No. 85-5521

No. 86-5511

United States of America,

Appellee,

versus

Michael Thomas Timmermann,

Appellant.

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On Petition for Rehearing with Suggestion  
for Rehearing In Banc.

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O R D E R

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for

rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Wilkins, with the concurrence of Judge Hall and Judge Chapman.

For the Court,

(John M. Greacen)  
Clerk

Filed: January 15, 1987

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

No. 85-5521

No. 86-5511

United States of America,

Appellee,

versus

Michael Thomas Timmermann,

Appellant.

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Appeals from the United States District  
Court for the District of  
Maryland, at Baltimore.

Herbert F. Murray,  
District Judge.

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Upon consideration of appellant's motion  
to stay mandate,

IT IS ORDERED that the motion is denied.

Entered at the direction of Judge  
Wilkins with the concurrence of Judge  
Hall. Judge Chapman had no objection to  
the staying of the mandate.

-18-

For the Court,

(John M. Greacen)  
Clerk

Filed: February 13, 1987

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

UNITED STATES	:	
OF AMERICA	:	
	:	
v.	:	Criminal No.
	:	HM-84-00325
JEFFREY LANCE HARRIS,	:	
<u>et al.</u>	:	

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MOTION FOR CONTINUANCE  
OR IN THE ALTERNATIVE FOR SEVERANCE

Petitioner, Michael T. Timmermann, by his attorney Joshua R. Treem, files this Motion For Continuance Or In The Alternative For Severance and in support of this motion states as follows:

1. On Tuesday, September 24, 1985, counsel was advised that a co-defendant in this case, Jeffrey L. Harris, had been committed to the Psychiatric Institute in Washington, D.C. and would be unavailable for trial for approximately four (4) weeks. Counsel was further advised that Mr. Harris' attorney, Kenneth Robinson, would be petitioning the court for

severance based on those facts that the government would not oppose the severance for Mr. Harris. This Court subsequently severed Mr. Harris from the trial of this case on the basis of his unavailability.

2. As is more fully set forth in the Affidavit in support of this motion which has been filed under seal with the court's permission, Mr. Harris has exculpatory testimony which he would have provided in a joint trial with Mr. Timmermann. Such testimony goes to the heart of the government's proof against Mr. Timmermann and therefore is vital to his defense.

WHEREFORE, the Defendant requests that his motion for continuance be granted and that he be tried with Mr. Harris at Mr. Harris' retrial, or alternatively, that he be severed from the trial of the other defendants who are now scheduled to proceed to trial on September 30, 1985.



Respectfully submitted,

(Joshua R. Treem)

Joshua R. Treem (#00037)  
SCHULMAN & TREEM, P.A.  
Suite 1431  
The World Trade Center  
Baltimore, MD 21202  
PHONE: 301/332-0850

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion for Continuance or in the Alternative for Severance was hand-delivered this 30th day of September, 1985 to the following people:

Robert T. Durkin, Jr., Esq.  
8 E. Mulberry Street  
Baltimore, MD 21202  
Attorney for Defendant Bernard A. Campbell

Gregory Wilson, Esq.  
WILSON, GOOZMAN & BERNSTEIN  
9101 Cherry Lane  
Laurel, MD 20707  
Attorney for Defendant Russell Mattei

Tom Dyson, Esq.  
1914 Sunderland Place  
Washington, D.C. 20036  
Attorney for Defendant John C. Dorsch

John A. Hayes, Jr., Esq.  
1023 Cathedral Street  
Baltimore, MD 21201  
Attorney for Gary Moses

Glenda G. Gordon, Esq.  
Robert Mathias, Esq.  
101 W. Lombard Street  
8th Floor  
Baltimore, MD 21201

(Joshua R. Treem)  

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Joshua R. Treem

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

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UNITED STATES	:	
OF AMERICA	:	
	:	
v.	:	CRIMINAL NO.
	:	HM-84-00325
JEFFREY LANCE HARRIS,	:	
<u>et al.</u>	:	

...oo0oo...

AFFIDAVIT IN SUPPORT OF MOTION  
FOR CONTINUANCE OR IN THE  
ALTERNATIVE FOR SEVERANCE

I, Joshua R. Treem, am over eighteen (18) years of age and am competent to give this Affidavit:

1. I am the attorney for Michael T. Timmermann, a defendant in U.S. v. Harris, et al., Criminal No.: HM-84-00325.

2. In preparation for the defense of Mr. Timmermann in the original trial in March of 1985, I interviewed Jeffrey Harris, (a co-defendant and the person alleged to be the link between Mr. Timmermann and the major Government witness Alan Bozman) who indicated that he was planning to testify in that case and

with regard to Mr. Timmermann, would testify as follows:

a) That he has known Michael T. Timmermann through High School and beyond;

b) That he has never sold cocaine to Mr. Timmermann nor has he seen Mr. Timmermann use cocaine;

c) That at no time was Michael T. Timmermann a customer of his;

d) That Mr. Harris gave Alan Bozman Mr. Timmermann's telephone number for the purpose of having Bozman talk to Mr. Timmermann about becoming the manager of the hot tub business that Mr. Harris, Mr. Bozman and Mr. Avanzato were in the process of developing in the fall of 1982;

e) That Harris wanted Mr. Timmermann to become the manager because he knew that Mr. Timmermann had retail management experience through his work at McDonalds and because he did not wish Mr. Avanzato, who he believed was gay, to be

the manager of the hot tub business if for no other reason than that Mr. Avanzato had no management experience and Mr. Harris did not trust him;

3. Mr. Harris' testimony provides direct and contradictory evidence to Mr. Bozman's testimony and also provides an alternative explanation for what the government believes were drug related calls on the answering service used by Mr. Bozman. Furthermore, Mr. Harris' testimony would be consistent with Mr. Bozman's testimony that he did not hear from or receive a telephone call from Mr. Timmermann until some time after October 8, 1982; that Mr. Timmermann was not introduced to Mr. Bozman at the time that the other alleged customers were introduced (i.e. Batson, Rankin and Gonzalvez). It is also consistent with the timing of the phone messages on the answering service which the government will seek to produce.

It is further consistent with the documentary evidence which will show the negotiations for the bank loan, preparation of financial statements and other settlement documents relating to the hot tub business were prepared within the period of October to early December, 1982.

4. Inasmuch as Mr. Harris is the only one who can testify to such information in contradiction of Mr. Bozman, Mr. Harris' testimony is crucial and vital to the defense.

5. On Thursday, September 19, 1985, counsel again spoke with Jeffrey L. Harris, who at that time anticipated proceeding to trial as scheduled and testifying in his own behalf at the retrial. Mr. Harris also confirmed the above testimony and indicated that he would so testify at his trial.

6. On September 26, 1985, Mr. Harris' counsel likewise confirmed the testimony

that Mr. Harris would provide.

(Joshua R. Treem)  
Joshua R. Treem

COUNTY OF ANNE ARUNDEL:

SS:

STATE OF MARYLAND:

I HEREBY CERTIFY that on this 30th day of September, 1985, before me, the subscriber, a Notary Public in and for the County of Anne Arundel, State of Maryland, personally appeared Joshua R. Treem and made oath in due form of law that the foregoing Affidavit in Support of Motion for Continuance or in the Alternative for Severance is true and correct to the best of his knowledge, information and belief.

(Patti K. Skrinak)  
NOTARY PUBLIC

MY COMMISSION EXPIRES: 7/1/86